COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2622 **Cir. Ct. No. 2008FA595**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

JOHN MARSHALL MATOUSEK,

PETITIONER-APPELLANT,

V.

ROBYN RENEE MATOUSEK,

RESPONDENT-RESPONDENT.

APPEAL from an order of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Reversed and cause remanded.*

Before Vergeront, P.J., Higginbotham and Sherman, JJ.

¶1 PER CURIAM. John Matousek appeals from a post-divorce order denying his motion to modify his children's physical placement schedule. The

sole issue on appeal is whether the circuit court was required to appoint a guardian ad litem before deciding the motion.[1] We conclude that the court was required to appoint a guardian ad litem under WIS. STAT. § 767.407(1) (2007-08)[2] because the motion was one which, if granted, would substantially alter the amount of time each parent would spend with the children. Accordingly, we reverse the order and remand for further proceedings as set forth in this opinion.

¶2 The relevant facts are undisputed. Under the judgment of divorce, Robyn had primary physical placement, while John had the children every Tuesday and Wednesday evening from 4 p.m. until 7:30 p.m. during the school year, or until 8:00 p.m. during the summer, plus alternate weekends from Friday evening to Sunday evening. Under that schedule (and not including holiday or vacation arrangements which were not specified in the divorce judgment itself), John had the children for 130 days or evenings a year, plus 52 overnights. John's motion and amended motion for modification of placement sought equal placement, under which John would have the children for 182 overnights a year.[3]

¶3 Both John's original and amended motions cited a substantial change in circumstances as grounds for the placement modification. A substantial change in circumstances is a prerequisite for any change in placement filed more than two

[1] The appellant states at the end of his opening brief that "[w]hen finally determined, the appeal of attorney's fees award should be incorporated into this Appeal…." It does not appear, however, that there was a separate notice of appeal filed from a final award of attorney fees. Therefore, there is no other case to consolidate with this one.

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[3] John's original motion requested alternating weeks, while his amended motion sought to convert his Tuesday, Wednesday and Sunday placements to overnights.

years after the final judgment that "would substantially alter the time a parent may spend with his or her child." WIS. STAT. § 767.451(1)(b). As an alternative theory, John argued that the court could grant his motion under § 761.451(3), without finding a substantial change in circumstances, if the court viewed his amended motion to convert evening placements to overnights as *not* substantially altering the time each parent would spend with the children.

¶4 The court denied John's motion for a modification in placement because, it concluded, he failed to establish a substantial change in circumstances. Although it does not appear that the trial court explicitly addressed John's alternate theory, we can infer from its conclusion that the court was treating the motion as one filed under WIS. STAT. § 767.451(1)(b), not § 767.451(3). If the court had viewed the motion as one that did *not* substantially affect the amount of time each parent would spend with the children, there would have been no need for the court to determine whether there had been a substantial change in circumstances. Indeed, if the court had been proceeding under § 767.451(3), it would have been error for the court to deny the motion without addressing the best interests of the children, which is the sole standard for modification under that section.

¶5 On appeal the parties do not directly challenge the trial court's decision to proceed under WIS. STAT. § 767.451(1)(b) rather than § 767.451(3).[4]

[4] The parties dispute whether John was actually requesting relief under WIS. STAT. § 767.451(1)(b) or WIS. STAT. § 767.451(3) or both, but do not provide any argument addressing the validity of the trial court's implicit decision to treat the motion as one under § 767.451(1)(b). Specifically, they have provided no authority or analysis addressing whether the conversion of evening placement to overnight placement has been or should be treated as significantly altering the time a parent may spend with a child.

Because they have presented no authority or argument on that issue, we will assume without deciding that John's request for an equal placement schedule was properly handled under § 767.451(1)(b), as one that would substantially alter the time that each parent would spend with the children and therefore require a demonstration of a substantial change in circumstances. *Cf.* ***Keller v. Keller***, 2002 WI App 161, ¶¶8-9, 256 Wis. 2d 401, 647 N.W.2d 426 (treating mom's request to replace one of dad's monthly weekends with one additional weekday overnight each week as a substantial modification motion under § 767.451(1)(b)[5]). The only question now before us, then, is whether the trial court could properly refuse to appoint a guardian ad litem to represent the children on the question whether there had been a substantial change in circumstances under § 767.451(1)(b), before proceeding to the question of the children's best interests.

¶6 Robyn offers three theories under which the trial court could have been relieved of the responsibility to appoint a guardian ad litem for a hearing on whether there had been a substantial change in circumstances: (1) the criteria under WIS. STAT. § 767.407(1)(am) for a statutory exception to appointing a guardian ad litem were satisfied; (2) an appointment for the best interests of the children portion of a placement modification proceeding would qualify as "prompt" under §§ 767.407(2) and 767.405(12)(b); and (3) the parties here presented evidence on all of the elements that the guardian ad litem would have addressed. We reject each of these theories.

[5] Former WIS. STAT. § 767.325(1)(b) (1999-2000), which the court cited, was renumbered to § 767.451(1)(b) by 2005 Wis. Act 443.

¶7 First, WIS. STAT. § 767.407(1) provides that the court *shall* appoint a guardian ad litem whenever physical placement of the child is contested unless: (1) revision is being sought under, inter alia, § 767.451; (2) the "modification would not substantially alter the amount of time that a parent may spend with his or her child"; and (3) either the appointment of a guardian ad litem would not assist the court because the facts make the likely determination clear, or a party is seeking appointment for delay or some other tactical reason not in the best interests of the child. Taking into account the identical language in §§ 767.407(1)(am)2. and 767.451(3) regarding whether the proposed placement modification would "substantially alter the time a parent may spend with his or her child," this court has previously held that a guardian ad litem *must* be appointed whenever the alleged basis for modification is a substantial change in circumstances under § 767.451(1)(b). ***Fosshage v. Freymiller***, 2007 WI App 6, ¶¶8-14, 298 Wis. 2d 333, 727 N.W.2d 334. Since, as we have already discussed, John's motion here was treated as one for a substantial modification of placement, the exception for not appointing a guardian ad litem on a motion that would not substantially alter a parent's time with the children could not apply. We therefore conclude the court was required to appoint a guardian ad litem under § 767.407(1)(a)2.

¶8 With regard to the timing of the appointment, WIS. STAT. §§ 767.407(2) and 767.405(12)(b) require that the court shall "promptly" appoint a guardian ad litem upon being notified that mediation has failed. Robyn asserts that any appointment made before the court reaches the question of the best interests of the children should qualify as prompt. We disagree. While we see no reason why a court could not properly bifurcate a placement hearing to reduce the time and money to be expended upon a motion where it is questionable whether a

showing of a substantial change in circumstances could be made, Robyn has provided no authority that would allow the first portion of such a bifurcated hearing to proceed without a statutorily required guardian ad litem appointment. We see no basis in the statutory language for making such a distinction.

¶9 Finally, although Robyn does not explicitly use the term "harmless error," that is how we construe her argument that a guardian ad litem was not required here because the parties themselves addressed all of the relevant factors that a guardian ad litem would be required to communicate to the court. However, we have previously held that a violation of the statutory mandate to appoint a guardian ad litem is not subject to either a waiver or harmless error analysis because it is not the parties' rights that are affected, but rather those of the children. ***Fosshage***, 298 Wis. 2d 333, ¶19; *see also* ***Bahr v. Galonski***, 80 Wis. 2d 72, 83, 257 N.W.2d 869 (1977) ("Where the most important parties to the proceeding were wholly without their own representation, adequate fact-finding and enlightened and informed decision-making are impossible…." (citation omitted)). Moreover, we consider the uncontested fact that the parties' son was requesting more time with his father to provide a greater, not lesser, reason for the children's interests to be represented before the court ruled on the placement modification motion. As in ***Fosshage***, we conclude that the trial court's order here cannot remain in place unless and until the statutory mandate for a guardian ad litem's participation and input has been satisfied.

¶10 Accordingly, we reverse the order denying John's placement modification motion, and remand this matter for further proceedings in accordance with the procedure set forth in ***Fosshage***. That is, the court shall first appoint a guardian ad litem for the children, who shall be provided with a copy of the transcript of the hearing and all materials submitted by the parties. The guardian

ad litem shall consult with the children and make whatever additional investigation he or she deems necessary. The guardian ad litem shall then make a recommendation to the court, to which the parties shall be afforded an opportunity to respond. The court will then determine whether any additional proceedings are appropriate or necessary, before reconsidering the placement decision with the guardian ad litem's input. After reconsidering its decision, the circuit court may reinstate its original placement order, modify it, or fashion an entirely new placement order. *See* ***Fosshage***, 298 Wis. 2d 333, ¶20.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.